

Holland+Knight

**THE FAMILY EDUCATIONAL RIGHTS AND
PRIVACY ACT (FERPA) AND STATE
LONGITUDINAL DATA SYSTEMS**

Steven Y. Winnick
Holland & Knight LLP
steve.winnick@hklaw.com

**Montana Office of
Public Instruction**
Assessment Conference
Helena, Montana
April 23, 2007

I. FERPA Background

- FERPA applies to schools and local educational agencies (LEAs) that receive grant funds from the U.S. Department of Education (USED).
- In addition to giving parents rights to inspect and challenge the contents of their children's education records, FERPA prohibits schools and LEAs from disclosing students' education records without written parental consent, subject to list of authorized disclosures in the law.
- FERPA prohibits disclosure of personally identifiable information in students' education records, not anonymous data that cannot easily be traced to individual students.

Holland+Knight

2

FERPA Background (cont'd)

- "Education records" subject to FERPA protections are broadly defined in the law to include records, files, and other materials directly related to a student and maintained by a school or LEA or by a person acting for a school or LEA.
- Once a student reaches 18 years of age or is attending a postsecondary institution, the consent required of and the rights accorded to parents under FERPA accrue to the student.
- Under a 2002 decision of the U.S. Supreme Court in *Gonzaga University v. Doe*, parents and others may not sue a school or LEA for alleged violations of FERPA.
- USED, through its Family Policy Compliance Office, enforces FERPA.
- The ultimate potential sanction for a violation of FERPA is a cut-off of federal funds to the school or LEA, but the law requires USED to seek voluntary compliance before seeking any funding remedy.
- USED may be planning to issue proposed regulations that may address longitudinal data system issues.

Holland+Knight

3

II. Permissible Data Activities Related to State Longitudinal Data Systems – Non-Issues

Anonymous Data

- Without parental consent, a school or LEA may provide data to a state longitudinal data system (SLDS), and the SLDS may in turn share the data with other organizations and with the public, if the data are not easily traceable to individual students.
- Use of a student identifier makes the data anonymous only if the link of the identifier to the student is protected from disclosure.
- USED has advised that the unique student identifier may not be a social security number or scrambled social security number, or the student's regular school identification number.
- USED has advised that whether data are easily traceable to individual students should be determined according to generally accepted statistical principles and procedures.

Holland+Knight

4

Permissible Data Activities Related to State Longitudinal Data Systems – Non-Issues (cont'd)

Personally Identifiable Data – Program Evaluations and Audits

- FERPA authorizes state educational authorities to collect personally identifiable information from student education records at all levels of education in order to evaluate or audit federal and state programs and to meet federal requirements related to those programs.
- Thus, there is no violation under FERPA in creating a state data warehouse, obtaining personally identifiable information from student education records, and using these data to evaluate schools, districts, postsecondary institutions, teachers, and programs, including making accountability determinations under state or federal law.

Holland+Knight

5

Permissible Data Activities Related to State Longitudinal Data Systems – Non-Issues (cont'd)

Personally Identifiable Data – Assessment, Enrollment & Graduation Data at the Elementary and Secondary School Levels

- Provisions of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act (NCLB), expressly authorize SLDSs to link student test scores, length of enrollment, and graduation records over time. NCLB also vests in states the responsibility to provide diagnostic reports to schools and parents on state assessments administered under NCLB.
- It is clear under these provisions that an SLDS, without parental consent, may –
 - collect and store personally identifiable student data regarding performance on assessments, enrollment, and graduation;
 - use these data not only for program evaluation or audit, but also to track individual students and diagnose and address their individual educational needs; and
 - share these data with schools attended by the students.

Holland+Knight

6

Permissible Data Activities Related to State Longitudinal Data Systems – Non-Issues (cont'd)

Personally Identifiable Data – Authorized Studies

- A school or LEA may disclose students' education records to organizations that will conduct research studies on their behalf to improve instruction.
- What is less clear under the law is (1) whether an SLDS may make these record transfers; and (2) whether this provision applies to studies initiated by third parties and not paid for by the school or LEA. These issues discussed below.

Holland+Knight

7

Permissible Data Activities Related to State Longitudinal Data Systems – Non-Issues (cont'd)

Personally Identifiable Data – Disclosure to New School in which Student Enrolls or Seeks to Enroll

- A school or LEA may disclose students' education records to schools in which a student newly enrolls or seeks to enroll, including students who move from secondary education to postsecondary education, or from one district or one state to another.
- What is less clear under the law is whether an SLDS may make these record transfers. This issue discussed below.

Holland+Knight

8

III. Unresolved Issues/Solutions

Issue: Providing personally identifiable data to the SLDS for broad use in tracking and serving individual students

- Issue because FERPA expressly authorizes disclosure to state educational authorities only for evaluation or audit of a federal or state education program, **not** for other purposes.

Solution: Implement SLDS so that it maintains (and analyzes) student education records on behalf of schools and LEAs

- FERPA defines education records generally as records maintained by a school or LEA "or by a person acting for them."
- Providing the records to the SLDS no different for FERPA purposes from a disclosure to officials within the school or LEA. Records could be used for full range of purposes that the particular school or LEA may use them.

(Alternate solution: disclosure to SLDS comes within study exception, as well as evaluation and audit exception.)

Holland+Knight

9

Unresolved Issues/Solutions (cont'd)

Issue: General authority of the SLDS to disclose or re-disclose personally identifiable information

- Issue because FERPA bars re-disclosures by recipients outside school or LEA without written parental consent.

Solution: Implement SLDS so that it maintains student education records on behalf of schools and LEAs

- Under this approach, initial provision of the records to the SLDS would not constitute a FERPA disclosure outside of the school or LEA, and the SLDS would be able to provide the data to others as initial authorized disclosures outside of the school or LEA.

(Alternate solution: revise FERPA regulations to permit redisclosures that are consistent with disclosures authorized in FERPA)

Holland+Knight

10

Unresolved Issues/Solutions (cont'd)

Issue: Scope of Authority to Disclose Data to Other Organizations for Studies

- Issue because FERPA's language authorizes release of data for studies "for, or on behalf of" schools or LEAs, and USED has interpreted this to mean the study must be authorized by the school or LEA. Not enough that a study undertaken by another organization may benefit the school or LEA.

Solution: Issue state rules or guidelines for authorizing studies initiated by third parties

- These rules or guidelines would establish standards to determine whether there is a substantial interest of the schools or LEAs in a study proposed by a third party sufficient to authorize it for FERPA purposes, whether or not paid for by the school, LEA, or SLDS.
- In this way, states would be setting and applying more specific standards for implementing USED's general guidance in a reasonable manner.
- The rules or guidelines should address appropriate safeguards for released data.

Holland+Knight

11

Unresolved Issues/Solutions (cont'd)

Issue: Access of School/District Registering a New Student to Limited Records of All Students with Same Name

- FERPA does not generally permit disclosures of personally identifiable information for all students with the same name as a student newly enrolling at a school/district. Without this information, the new school may have difficulty identifying the new student and the correct records.

Solution: Designate limited information as directory information for the limited purpose of checking that information for all students with the same name to ensure identity of students.

- Needs to be done through statewide rules so all schools will use this limited directory information provision.
- Parents may direct that directory information not be disclosed without their prior consent, but that is likely to happen rarely, if at all, for these limited disclosures.

Holland+Knight

12

Unresolved Issues/Solutions (cont'd)

Issue: Matching of Student Records with Records Maintained by Non-Education State Agencies such as State Employment or State Medicaid Agencies

- FERPA authorizes release of student records for audit or evaluations of education programs only to State education officials.

Solutions: The non-education agency may provide its records to the longitudinal data system for matching purposes; or student records may be provided to the non-education agency for matching if the purpose is to audit or evaluate federal or state education programs, or to ensure compliance with federal requirements for these programs.

- Some programs administered by non-education agencies may be considered education programs, such as vocational education, occupational training, and school-based Medicaid services.
- Officials who administer these programs may receive the records for the purpose of audit and compliance of these programs.
- If the purpose is evaluation, there is an argument that these officials are education officials with reference to these programs and may receive the records.

Holland+Knight

13

IV. Postsecondary Institutions

- Many postsecondary institutions may not consider it appropriate to vest responsibility in the state longitudinal data system to maintain some of their education records.
- This does not bar them from disclosing personally identifiable information on their students to the SLDS under authorized disclosures in FERPA, including studies and evaluation (e.g., to evaluate student preparation for college by high schools).

Holland+Knight

14

V. Next Steps for States:

States that have an SLDS or are planning to establish an SLDS should take the following steps to ensure consistency with FERPA, based on the above analysis.

Review/Revise state law/regulations/guidelines

- Review state laws and regulations to ensure that they do not preclude the SLDS from acting for schools and LEAs in maintaining and analyzing students' education records.
- Develop and issue regulations or guidelines (or enact state laws) that clarify the role of the SLDS in acting for schools and LEAs in maintaining their students' education records and the range or types of records covered.

Holland+Knight

15

Next Steps for States:

- Develop and issue regulations or guidelines (or enact state laws) that establish standards for a school, LEA, or the SLDS on their behalf, to "authorize a study" initiated by another organization for the purpose of improving instruction and establish procedures for entering agreements with organizations to ensure the disclosure comes within the FERPA provisions and complies with FERPA safeguards, perhaps modeled on the licensing procedure used by the Institute for Educational Sciences, and perhaps including sanctions for any unauthorized redisclosures.
- Review state privacy laws to determine that the collection and disclosure of personally identifiable information from student education records by the SLDS complies with these laws as well as FERPA.

Holland+Knight

16

Next Steps for States (cont'd)

- Issue regulations defining date and place of birth, name of parent, and current and former address as directory information for the limited purpose of permitting schools/districts registering a new student to check that information for all students with the same name.
- Enter agreements with postsecondary institutions to share data for evaluation/studies.

Holland+Knight

17

Next Steps for States (cont'd)

Ensure Firewalls in SLDS

- Ensure that education records maintained in the SLDS on behalf of a school or LEA are properly linked to that school or LEA, with "firewalls" that bar access to those records by any other agency, institution, or person, except pursuant to an authorized FERPA disclosure or as otherwise consistent with FERPA.

Notification to parents of maintenance of records in SLDS

- Ensure that each school or LEA, in its annual FERPA notification to parents, notifies parents of:
 - the role of the SLDS in maintaining education records for the school or LEA and which types or categories of records are covered;
 - the criteria for determining which employees (or contractors) involved in administering the SLDS have legitimate interests in having access to personally identifiable information in these records;
 - the procedures for asserting rights under FERPA with regard to these education records; and
 - The directory information policy for identifying new students registering at any school/district.

Holland+Knight

18

Next Steps for States (cont'd)

Allocate FERPA functions between SLDS/schools/LEAs

- The school or LEA remains accountable to USED for overall compliance with FERPA, but a state could decide to centralize FERPA functions incident to the maintenance of records by the SLDS.
 - These functions include, for example, provision of required parental notices, making records of disclosures, and providing related parental rights to contest the contents of records in connection with specific disclosures.
- Each state needs to decide and clarify for parents which procedures will be implemented at the school or LEA level and which may be implemented centrally with regard to records maintained by the SLDS on behalf of the school or LEA.
 - Appropriate SDLS agreements with schools and LEAs or state regulations or guidelines should address where these responsibilities are lodged.

Holland+Knight

19

Conclusion

- Federal law sanctions and supports State longitudinal data systems, which are intended to facilitate more effective use of data for improving education and meeting the academic needs of students, consistent with core state and federal policy and law.
- Through State longitudinal data systems, States, educators, and researchers can use student data to meet these purposes without violating FERPA or the privacy protections of students and their parents that FERPA is designed to secure.

Holland+Knight

20

Holland+Knight

Summary paper available at <http://www.dataqualitycampaign.org>

Full paper available at
<http://www.hklaw.com/Publications/OtherPublication.asp?ArticleID=3652>

3475345 v1
